THE PRINCIPLES OF CRIMINAL PROCEDURE AND POST-MODERN SOCIETY: CONTRADICTIONS AND PERSPECTIVES

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1. Introduction

War is the "continuation of politics by other means"[1]. It does not alter the goals of politics. Since war has again been in discussion, there has again been talk of revenge and retribution. If these are the goals of politics, they will not be without influence on legal policy and the politics of the criminal law. Revenge and retribution - these were proscribed expressions, the pariahs of every modern theory of criminal law, since the reform epoch of the 1960s. Now, as before, they may be used without inhibition. This has consequences for criminal procedure. Criminal law and criminal procedure are even more closely related than war and politics. Criminal procedure is not another means for continuing the politics of the criminal law, rather it is the only means by which the concepts of legal policy in the criminal law are made transparent and allowed to be effective.

Seen in this way, there is never peace in the domain of criminal law. Precisely this tension has been exploited in the previous decades by a particular interest group in the legal policy debate. There was talk of new "weapons" which had to be added to the police arsenal. One has heard much of war and little of peace. One speaks constantly of the battle against organised crime, the enemy within, who is ever-powerful and who can only be fought by reform of criminal procedure and re-armament. More efficiency, less consideration of the rule of law, more for the victim, less for the perpetrator and so on.

As early as 1985, *Jakobs* spoke of *Feindstrafrecht* ("criminal law for the enemy")[2] and used this vocabulary again in 1999 at the Berlin symposium on "German Criminal

[1] Carl von Clausewitz, On War, 1832
[2] ZSTW 97 (1985) , 751, 756 ff., 783 f.

Law Studies at the Turn of the Century"[3]. *Feindstrafrecht* is war, war against the enemies of society. However, *Jakobs*' apocalyptic vision is not dangerous because it threatens to become real. The real danger lies in *Jakobs'* call for the isolation of *Feindstrafrecht* and the defence of classical *Bürgerstrafrecht* ("criminal law for the citizen") separately, as liberal and constitutional. We should not permit this bifurcation of criminal procedure. A state governed by the rule of law should not create a special law for its enemies. It must also remain true to its basic values when dealing with the enemies of the constitutional state. Thus, it must treat them fairly and justly in a process dedicated to the search for truth and the foundation of peace under law. These fundamental values of criminal procedure may not be made conditional on the person against whom the criminal proceedings are aimed.

I do not wish to enter further into the controversy surrounding war and peace in our society's penal policy here, rather I will merely attempt to take stock. What is the state of our criminal process and its basic values, as ideals and in reality? Which models are being followed by the legislator? The fundamental principles of criminal procedure are nominally unchanged: truth, justice and peace under law. However, a subtle transformation has taken place in their internal meanings and in their relationships to each other. I would like to elucidate this change and in so doing highlight the places at which our criminal procedure contains democratic elements or permits them to go lacking and the points at which the accused has lost or gained rights and powers.

2. Truth

Strict legal teaching in Germany still holds tightly to the notion of the material truth (*die materielle Wahrheit*). Truth is understood as the coincidence of a mental impression of an event and the event itself. Because there is truth, one only need find it and to search for truth and reconstruct reality as precisely as possible, that is the task of the court[4]. With this, it is irreconcilable to admit dispositions on the truth, i.e. consensual agreements about what took place. Reality is just as incapable of being the subject of a disposition as truth. Neither may the subject matter and the scope of

[3] Contributions published under the same name, Die deutsche Strafrechtswissenschaft vor der Jahrhundertwende, München (C.H. Beck) 2000

[4] On the correspondence theory of truth and its problems cf. Volk, Wahrheit und materielles Recht im Strafprozess, 1980

the search for truth be prescribed to the courts. The contrary position is disqualified by the dominant teaching as mere formal reality (*die formelle Wahrheit*) which one may tolerate in civil proceedings but which cannot be admitted in criminal procedure.

One begins to comprehend the following in Germany: firstly, the alleged opposition between “actual” and “merely formal” truths does not exist; secondly, it is a mistake to tie the notion of “truth” too closely to the *ex officio* search for truth; thirdly, other conceptions of truth are no less valuable in achieving justice. I do not wish to examine these three points in detail, however, I will at least comment briefly.

As to the first point:

The so-called “material” truth is also formalised in many ways[5]. This is due for example, to the formality of the proceedings (*die Förmlichkeit des Verfahrens*) i.e. to the rule that only particular forms of evidence may be used in particular ways. Legal doctrine in Germany has always been proud of the formality of the proceedings and has stressed the value of form in protecting the parties’ interests. This pride has evidently blinded it to the “formalisation” of the truth, which is tied to the formalisation of the proceedings. The truth is also distorted through numerous legal guarantees, such as the evidentiary prohibitions that prevent investigation of the whole truth. They force us to ignore parts of reality and to exclude them from the search for truth. In effect, this too causes a formalisation of the truth.

As to the second point:

The work of determining what actually happened can also be left to the parties. The inquisitorial system is not in principle better suited to this task than an adversarial system. Indeed, German law also establishes the institution of cross-examination, albeit only on paper. Practically, it does not have the slightest significance. In the common law, cross-examination has been held “the greatest legal engine ever intended for the discovery of the truth”[6]. In German criminal proceedings, the self-interested parties are not trusted to supply information or to control the information relied on by the other side. Searching for the truth is the state’s task.

[5] cf. Volk, Salger-FS, 1995, p. 411 ff.

[6] Wigmore, On Evidence, Vol. 4, 1974, p. 32

As to the third point:

The importance of the procedural norm of fairness, which can compensate for a deficit in truth and guarantee a generally just verdict, has long been underestimated in Germany. The notion of material truth has been transfigured and made absolute, whilst ignoring the reality that the truth is only part of an overarching cost-benefit calculation. Truth, it has always been emphasised, may not be discovered at all costs for other norms guaranteed in the constitutional state must also be considered. However, in so alleging, one has clutched to the belief that justice and peace under law may only be reached via the material truth.

Meanwhile, many elements of procedural justice, as well as the power of the parties to create dispositions on the substance and result of the proceedings, are in debate. Such dispositions (or “deals”) are a reality of justice as it is administered everyday, yet they remain controversial and generally untreated in the literature. The opponents of discourse and consensus mourn the collapse of the principles of criminal procedure. In so doing, they overlook a comparable development in the substantive law. Here too traditional civil law approaches the common law, insofar as the elements and reasoning of case law parallel the classical system of continental European legal thought. Accordingly, the relationship between judge and legislator is also changing. Responsibility for just resolution of the individual case is shifting increasingly from the laws of Parliament to the courts. There is a certain parallel between the individualisation, which is taking place in the substantive law, and the privatisation, which is emerging in procedural law. The deciding factors play-out in the microcosm of the individual case and are less influenced by the system’s commands at a macro level. (Accompanying this tendency we may observe a schematisation of criminal process in routine cases and in petty crimes. Every particularity of the individual case is suppressed and unlike cases treated as like. I cannot continue with this particular symptom of the dangerous bifurcation of criminal procedure for the unique and the generic case here).

3. Lay judges

In an adversarial system, such as I have just discussed, fact-finding and decision-making are distinguished more strictly than in an inquisitorial model. This approach has much to commend it. It is moreover indisputable that the judge, who has led the investigation, can no longer decide on the case with full impartiality. It is another question entirely, however, whether this decision should be entrusted to lay persons. For many reasons, I do not think much of this proposition[7]. I would not term the participation of lay persons a democratic element in the criminal proceedings because their participation is of no identifiable consequence. I do not even regard participation by non-lawyers as a democratic fig leaf because there is no weakness which the constitutional state must bashfully seek to conceal. On the other hand, the participation of lay persons in the trial is not harmful (so long as they do not fall asleep and thereby render the verdict open to attack).

4. The investigative proceedings and the trial

The trial is the high-point of any criminal proceeding. This is true world-wide, irrespective of whether the trial is inquisitorial or adversarial in form. Admittedly, the elevation of the trial may be better attributed to its symbolic character. Often the dice have fallen even before the trial begins. Unnoticed we have stepped back towards the Middle Ages. In those times, there was a “final day of law” (*den endlichen Rechtstag*), a public and oral proceeding, in which the predetermined judgement was merely reproduced and portrayed. Contemporary trials, which are proceeded by a deal, are not very different. Yet, there is one significant difference and it is indispensable. In those times, in the old inquisitorial process, the same judge conducted the preliminary investigation and later passed judgement. It is common knowledge that these functions have been separate since the reform movement of the Nineteenth Century. They must stay this way. Only the strict division of functions between prosecutor and judge can guarantee that the latter does not confirm his/her own prejudices (as previously mentioned, it is suspect enough that the judge conducts the investigation during the trial). Only by dividing the two parts of the

[7] Volk, in: Dünnebier-FS, 1982, p. 373 ff.

proceedings into investigation and trial can it be guaranteed that two independent institutions must agree before a conviction is reached. Most importantly, this division ensures that the accused may share in, and exert influence on, the taking of the evidence and that s/he may examine the evidence and demand to be confronted with the witnesses in court.

It is at this point that fractures and problems begin. The trial has long deviated from the law makers' vision of the place in which the evidence is produced. This has long occurred *de facto* in the investigation. Now, evidence is often merely reproduced at trial. One will no longer be able to affect the practical reality that the focal point for the collection of evidence has shifted from the trial to the investigation. The question is how one deals with the situation.

5. The principles of immediacy and orality

The division between investigation and trial requires that the prosecutor grapple twice with the evidence. In the investigation s/he must attempt to find evidence which leads to reasonable suspicion of the offence (*den hinreichenden Tatverdacht*) and at trial s/he must present the evidence once again and combine it so as to convince the court of the accused's guilt. Most evidence becomes weaker with time. Physical evidence may be conserved but oral testimony fades with the memory of the witnesses. It is thus no wonder that the prosecution frantically conserves its statements and then seeks to draw on these reserves in the proceedings. However, just as in real life, reserves are only supplies for emergencies.

The foundation principles of the immediacy and the orality of the proceedings (*die Unmittelbarkeit und Mündlichkeit des Verfahrens*) permit the appearance of witnesses. Here, at trial, the accused has the possibility to attack the witnesses for the first time. The right to be confronted by them is the true reason for the proposition of immediacy. Although the principles of immediacy and orality were previously regarded as elements of the search for truth in Germany, a large body of opinion now sees the more significant connection between these principles and the accused's right to defend the charges.

Hence, they are also particularly at risk. In an inquisitorial procedural model, which relies on the *ex officio* investigation of the truth, those rights, which guarantee the accused influence on the discovery of the truth, are in principle dubious and always in danger of being dismantled. The same applies for the role of the defence and its scope for action.

6. Secret investigations

These dangers are particularly apparent in the investigative proceedings. Just as in the classical inquisitorial process of times long passed, the investigative proceedings are conducted in writing and in secret. The suspect – how could it be otherwise in a modern constitutional state? – is not a mere object of the investigation. Nonetheless, one really cannot say that the accused's rights or possibilities to exert influence on the proceedings are particularly pronounced. S/he may not even be present when the public prosecutor or the police question witnesses or the co-accused. His/her defence counsel is also excluded. Indeed, if the prosecutor sticks to the letter of the law, the suspect will spend a long time groping in the dark. S/he does not know what has just happened and cannot exert any influence on the rhythm or the direction of the investigation. Nonetheless, many prosecutors still arrange the proceedings *praeter legem* in a way which is generally co-operative. They include the defence counsel from the beginning and allow the defence to view the files. Particularly in economic crimes, this practice is worthwhile for both sides. In the majority of cases, this co-operation leads to a deal about the course of the trial and its result. If the investigations have proceeded co-operatively, few reasons remain for argument and confrontation at trial.

This informal, well-functioning procedural model developed outside the Criminal Procedure Rules and demonstrates what reform of the procedural law could look like. At present, a secret, written investigative proceeding, which leaves the accused largely without rights, is followed by the trial, which, according to the law's intent, is rightly the forum for the oral and public production of evidence. In truth, evidence is merely reproduced, that is, transported from the investigative to the main proceedings. The conflicts that necessarily result could easily be avoided if the

accused were afforded the right to participate in the investigative proceedings, or at least to exert control over them.

Had one only granted the accused these rights, the subject matter of the dispute could be disposed of at trial. With permission of the prosecutor, the suspect could deem parts of the case undisputed. It is clear that this would limit the principle of immediacy. However, such a qualification would benefit the accused. Conversely, the numerous existing restrictions on the principle of immediacy (the reading of transcripts in court, etc.) today tend to burden the accused.

7. The right move the court take evidence

Of all the accused's rights to influence the course and direction of the trial, this is the most important. The modern history of the accused's right to move that the court take evidence (*das Beweisantragsrecht*) is, however, a history of its dismantling. It is repeatedly criticised as obstructive and time consuming. Understandably, it has been abolished in fast-tracked proceedings[8]. What is not understandable is that it has been abolished in many other proceedings at the District Court level. Someone who has received an order of summary punishment, is not satisfied with the quick, written and abbreviated proceedings, lodges an appeal and may reasonably expect a normal trial at first instance before the District Court. This is not to be, however. Parliament has abolished the accused's right to petition the court to take evidence in summary proceedings. When measured against the large number of cases that are dealt with summarily, this is a scandalous occurrence.

As noted, the *Beweisantragsrecht* provides the greatest opportunity for the accused to influence the course of the proceedings. Were such opportunities opened to the accused at an earlier stadium, it would be legitimate to consider limiting this right at trial.

[8] This procedure serves to quickly and simply try offences of minor and middle seriousness which are clearly evidenced and legally unproblematic; cf. Volk, Strafprozessrecht, 2. Edition 2001, p. 243 ff.

8. The evidentiary prohibitions

Not all evidence which is produced in the investigative proceedings may be reproduced at trial. That is prevented by the evidentiary prohibitions (*die Beweisverbote*). The evidentiary prohibitions are many faceted and present an astonishing number of unsolved problems. I can only take up a few aspects here.

The evidentiary prohibitions do not serve the interest of discovering the truth. Some of them do have the effect of excluding dubious evidence (such as extorted confessions). However, this is only a side effect of the protection of other interests (such as the accused's right not to give evidence in the aforementioned example of the extorted confession). Most evidentiary prohibitions prevent discovery of the truth. They ensure that a truth other than the "actual" truth is established in the proceedings; they are suited to falsifying and distorting the truth. A constitutional state just has to accept this, but does not do so gladly. The interests that concern the evidentiary prohibitions are constantly in danger and to a certain extent pressured by devaluation. This applies above all to the principle of *nemo tenetur*. I will return to this point shortly. First I will cite another example: one finds a diary and would like to use it. Now, the German Federal Constitutional Court supposes that there are three spheres of personality: the social, the private and the intimate. Should the secret (the diary) fall within the intimate sphere, it will remain a secret forever. On the other hand, there are no secrets in the social sphere. If the diary is assigned to the private sphere, however, a weighing-up will take place between this interest and the interest of discovering the truth. The more shocking the act, the more serious the allegation, the less weighty are the accused's interests in being able to retain his/her private sphere. At heart, this balancing principle dominates the entire doctrine of the evidentiary prohibitions and proves that all the interests protected by those prohibitions are assailable and at the disposal of the court.

Conversely, the majority view holds that the evidentiary prohibitions may not be disposed of by the accused. This conclusion is derived from the statutory provision (§ 136a Abs. 3S. 2 StPO) which prohibits the use of illegally obtained statements, even with the consent of the person affected. Thus, there is a core belief that all

evidentiary prohibitions fundamentally serve to protect the norm of human dignity, which none may alienate or control. This is anything but obvious. Let us assume that the confiscated diary may not be relied on because it affects the inner core of personality (the intimate sphere). If the person affected now wishes that it be read before the court to document his/her desperate situation before the act, why should this not be allowed to occur? Another example: the telephone of the accused is illegally tapped such that the recordings of the conversations may not be taken into account. Now, in one of these telephone calls the only witness for the prosecution announces that s/he intends to ruin the accused with a false testimony and will commit perjury if necessary to achieve this. The accused would not appreciate that, by prohibiting the evidence, we are actually insisting on his/her human rights.

In reality all evidentiary prohibitions deal with information which has been illegally obtained by the law enforcement authorities or legal information which would injure those rights of the accused's that are more valuable than the investigation of the truth. The pivotal question then becomes who has ownership of such information. Why should this always be the state, as currently favoured, even when it is the state, which has obtained the evidence illegally and not the accused, from whose life the information comes? It is at this point that developments could grant the accused powers of disposal (at least in those cases where a third party is not simultaneously affected – as is admittedly the case in the example of the illegal phone tap). This is all still unresolved and problematic from the ground up[9].

Finally, the evidentiary prohibitions have a general preventative function. It should not be worthwhile for the law enforcement authorities to use unlawful practices. This aspect of the protection of procedural fairness is traditionally underestimated in Germany. There is the fear that the accused could also dispose of fairness if s/he were granted the power to dispose of his/her rights. Viewed in isolation in his/her individual case, the accused could profit from the decontrol of illegally obtained, but favourable, evidence. Yet, it is said that the institution of the proceedings would be compromised if the value of fairness were made conditional on the result to which it led.

[9] On this discussion cf. the overview by Volk, Strafprozessrecht, p. 212 ff.

Evidentiary prohibitions are in part indispensable because they serve to sanction violations of the law, which cannot be sanctioned otherwise through procedural means[10]. Leaving this briefly aside, many evidentiary prohibitions are the legal dogma's makeshift solution to problems that arises from a schizophrenia in the law. An example: a person has gone bankrupt and owes his or her debtors information and explanation under the relevant laws. However, to avoid the suspicion that s/he brought about the bankruptcy criminally, the person relies on the right to silence. As a debtor, s/he must speak and as a potential accused s/he may remain silent. This schizophrenia is resolved by discovering an evidentiary prohibition. In civil procedure, the duty to co-operate with the authorities (*die Mitwirkungspflicht*) persists and in criminal procedure, where there is no such duty, that which the debtor has said may not be used against him. It is the principle of *nemo tenetur* which leads to numerous evidentiary prohibitions. Now that the evidentiary prohibitions are burdensome things that disrupt the quest for truth, however, it is not surprising that the basic principle of *nemo tenetur* has also come under pressure as a disruptive influence.

9. *Nemo tenetur se ipsum accusare*

In my opinion, this principle is widely overvalued in Germany. For a start, and when viewed quite practically, stony silence is seldom an intelligent defence. To me, this strategy is also extremely suspect. A confession is widely thought to mitigate punishment. The opposite conclusion, that a refusal to co-operate in any way exacerbates punishment, lies closer. The mere fact that a detrimental conclusion may not be drawn, does not remove the suspicion that it is practised, disguised and beyond proof, nevertheless.

Yet, let us disregard this tactical consideration entirely. The importance of the *nemo tenetur* principle is overestimated, firstly, because the legislator sees to it that the accused's right to silence does not stand in the way of a conviction. Particularly in economic regulatory law, there are numerous obligations requiring the documentation of business activities, the preservation of receipts, the keeping of accounts and the presentation of records etc.. Viewed through the lens of a criminal prosecution, these duties are nothing more than requirements to collect evidence against oneself. Of

[10] It is of little assistance to the accused that the official who forced the confession through a beating is

course, when all the evidence is tabled, one can guarantee the right to silence in great gestures.

It is a tempting thought for the legislator to devise a virtual legal trap. Sometimes it even does. Take, for example, the tachograph in a semi-trailer. It is forbidden to drive too fast. To ensure observance of this prohibition, and simultaneously to prove its transgression, an obligation is created to record and have ready evidence against oneself. Naturally, the legislator will dispute having introduced the tachograph to safeguard evidence, and rather will assert that the instrument serves the preservation of road safety. Behind this lies the interesting question whether the legislator requires such excuses or whether it may quite openly pretend that the "provability" of an offence is itself the social interest which must be protected by the criminal law[11].

For substantive reasons, the right to silence is also worthless in true crimes of omission[12]. He who has omitted to keep books of account will be punished. How then should the authorities responsible for the criminal prosecution prove that something has not happened? Already in Roman law one knew: *negativa non sunt probanda*. Here, something is required of the state which no-one can achieve. The consequence is to demand of the accused that which the law may not demand, namely that the accused confess or exonerate him/herself (in that the books are produced). Yet, let us depart from the substantive law with its consequences for the *nemo tenetur* principle and examine that principle's procedural reach.

10. The right to silence and the duty to co-operate

In reality, the rule of *nemo tenetur se ipsum accusare* is only significant in proof of mental facts[13]. By means of numerous coercive measures, which the accused is forced to tolerate, the state may obtain physical evidence as a substitute for co-operation. Why is the state not then permitted to procure a substitute for oral statements regarding the accused's mental state, which the accused has refused to

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threatened with a conviction for bodily harm.

[11] This would lead into the debate on the utility of the principle which requires the protection of social interests through law and thus into another topic.

[12] In this respect cf. Volk, Tröndle-FS, 1989, p. 219 ff.

[13] In this respect cf. Volk, Fünfzig Jahre Bundesgerichtshof, Festgabe aus der Wissenschaft, 4. Edition, München 2000, p. 740 ff.

give? The standard explanation is that the suspect would be indirectly compelled to talk, were detrimental conclusions drawn from silence. This is indeed correct, although not particularly convincing. The notification of a search and seizure is itself no more than a threat to set aside the refusal to co-operate and obtain the material by force, i.e. an indirect compulsion to produce evidence. The true reason why conclusions may not be drawn from silence has, in my opinion, little to do with human rights, basic civil rights or other principles fundamental to the rule of law. It is due quite simply to the fact that such conclusions are never unambiguous and are thus worthless in determining the truth. It is not helpful to draw them. That is the pragmatic heart of the matter. The substitute for the retained document is the seized document. The substitute for the refused statement remains unknown. One does not know what the accused would have said and one may not invent or construct it. Seen in this way, it is actually irrelevant whether one goes ahead and grants the accused the right to silence directly or simply refrains from sanctioning the violation of the established duty to tell the truth. The sanction for this violation could only entail feigning the submission of a truthful statement and this sanction is out of the question because the truth is unknown. The truth must be determined through circumstantial evidence (I will return to this point shortly). The refused confession of intent (and the entire *mens rea*) may not be replaced by conclusions drawn from silence. In this way, the practical significance of the *nemo tenetur* principle in the proceedings is reduced.

There is an interesting theoretical parallel to this point. The unimpeachable core of the right to silence only guarantees that one will not be forced to testify against oneself or confess guilt[14]. In Anglo-American law, the principle of *nemo tenetur* only obtains to verbal statements. German law goes much further, thereby deriving the freedoms not to incriminate oneself in any way whatsoever, and not to co-operate in one's own conviction through any conduct whatever. This position will not be internationally tenable in the long-term. It is problematic in practice as one cannot always sensibly separate the individual's acts from the individual's acquiescence in the acts of others (I cannot examine this further here). A further, and until recently unconsidered, aspect arises at this point. Legal persons, associations and corporations may not rely on this privilege in criminal proceedings to refuse to produce documentation. If a company director now surrenders the requested

[14] Art.14 Abs.3 lit. g. IPBR

documents, should s/he then be able to argue that these documents may only be used in an action against the corporation and not also against him/her personally? An evidentiary prohibition of this nature is implausible. There is not yet a concept of criminal responsibility for legal persons in Germany. This will come, however, and at the latest then will we be forced to consider the ambit of the *nemo tenetur* principle anew.

I would like to finish this point with a legal-historical reminiscence. The rule "*nemo tenetur se ipsum accusare*" already applied in the inquisitorial process of the Middle Ages. No-one was required to instigate a legal action against him/herself. However, if an action was commenced and a suspicion established, the suspect was obliged to tell the truth and render a confession. The principle of *nemo tenetur* was therefore understood literally and as related only to the instigation of the proceedings. The wheel of history would not now turn back this far. However, I think it certain that the broad interpretation currently favoured in Germany will not be sustainable.

11. The burden of proof

No-one is obliged to incriminate him/herself. According to the traditional German view, no-one is obliged to exonerate him/herself either. The accused does not bear any sort of onus *probandi* in a criminal proceeding. If a fact remains unproved, one may neither depart from a presumption which is disadvantageous to the accused (the objective burden of proof), nor may one require the accused to call and present certain evidence (*Beweisführungslast*; subjective burden of proof). This is correct and yet it is not the whole truth. In a system in which the court must establish the truth *ex officio*, clarification of the events and production of evidence is indeed a matter for the court. However, the court will only go on to violate its duty of explanation if it fails to pursue concrete and tangible indications that point to another closely related sequence of events. Often, only the accused is in the position to identify such perspectives. Now, if s/he does not do this, but is silent, then the picture formed by the court for itself simply remains. In this way, the normal course of things, the typical case, that which normally lies close to the truth, comes to be relied upon. One sees that there is indeed *prima facie* evidence in the criminal law after all (despite all differences that allegedly exist between formal truth in civil procedure and material

truth in criminal procedure)[15]. True it is that the accused has no duty to bring evidence, however, if s/he does not the result will be to his/her detriment.

12. *In dubio pro reo*

It is admittedly correct, however, that the accused does not bear the objective burden of proof in German criminal procedure. Something which remains unclear may not be accompanied by legal consequences that are detrimental to the accused. This proposition guarantees the rule "*in dubio pro reo*". This rule regulates the burden of proof. German legal doctrine is reluctant to recognise this, as it does not wish to characterise an acquittal as a burden on the state. Nonetheless, every procedure requires a legal rule for the situation that something remains unproven i.e. a rule regulating the burden of proof, and in criminal procedure the rule *in dubio pro reo* is just that.

This rule is remarkably weak. As late as the Nineteenth Century, the burden of proof was divided in Germany between evidence of the accusation (*dem Anschuldigungsbeweis*) and evidence of the excuse (*dem Entschuldigungsbeweis*). Similar rules may still be found in Anglo-American criminal procedure today. Majority opinion in the United States does not regard this to be a contravention of the principle of *in dubio pro reo*. In Nineteenth Century Germany the divided burden of proof was likewise thought consistent with this rule.

The rule is also weak because it does not state when one should doubt. It only regulates what should happen in case of doubt. Against a court, which shows itself to be subjectively convinced of a matter, this rule is powerless.

Finally, the rule breaks down where the law does not initially allow doubt to appear. Modern legislation, particularly in economic regulatory law, solves evidentiary problems already in the substantive law. Those elements of the offence, which, experience shows, present problems of proof, are simply abolished. This has occurred, for example, in the special forms of fraud that have been classified together with the traditional offence of fraud. In social security fraud, credit fraud and fraud in

[15] On prima facie evidence in criminal procedure, cf. Volk, GA 1973, 161 ff

the tender process, the law makers have dispensed with the element of damage because damage (not to mention intent to cause damage) was too difficult to prove. One cannot be thrown into doubt by that which one need not prove. This strategy (of minimising the requirements for the elements of the offence in the substantive law) is resorted to with increasing frequency. Against it, the rule of *in dubio pro reo* is totally powerless.

Future Prospects

Thus, I have returned to the theme with which my paper began, namely the relationship between substantive and procedural laws. As shown above, the substantive law determines the agenda processed in the procedural law. This reality has led to a deeply ingrained misconception that procedural law is simply auxiliary in function to the substantive law. Procedural law has long been understood as a mere instrument. One has not seen that it reacts upon the substantive law. One has overlooked the creative power and the strategies for conflict resolution contained in the procedural law itself. Thus there is, for example, no clause in the German substantive law which would permit resolution of the problem of petty crime. This occurs exclusively in the proceedings and overwhelmingly at the decree of the Department of Public Prosecutions. The prosecutors pursue the politics of the criminal law on their own accord and without the slightest legislative sanction or binding program and accordingly without the slightest democratic legitimisation.

To perceive and remedy deficiencies of this sort, one must understand procedure as an independent sphere of legal regulation. Every practitioner knows that criminal proceedings are decided principally by one’s mastery of the procedural law, whereas the substantive criminal law does not occupy the starring role (and the General Part of the Criminal Code, the favoured child of German criminal law studies, often no, or only a side, role). This has nothing to do with “everyday practice”, and its routines. Rather it reflects the power relationships within these areas of law. It is the procedural law in which the state demonstrates its power and in which that power is constrained. In reality, the substantive law exists on paper alone. It is the procedural law which intervenes in the life of the accused.

I have not yet discussed post-modernism although it does appear in the topic which I was invited to address. The great textbooks on the General Part of the German Criminal Code, as they have been cultivated principally in Germany, are to me like the pyramids: tremendous in size and conformity, perfect in form and meaning – and monuments to a dying era. The substantive law of Europe, should there be a uniform law, will be simpler than the German law; not so highly differentiated. This will be achieved not least in the procedural law. It should be easier to reach a common understanding on principles of procedural law than it is to agree on the dogma of the substantive law. The common law will have a great influence on this convergence of differing principles, particularly in the law of evidence. One will be forced to revise traditional legal thought in Germany and, if I am correct, the first reformers in the universities and in the German Federal Constitutional Court have already begun.